DOD FOIA/PA 101:

DOD Overview Training on the Freedom of Information Act (FOIA) & Privacy Act (PA)

25 Jan 2006

YOU'VE GOT A TOUGH JOB

- SO TO SUCCEED YOU NEED TO:
  - COMMUNICATE EFFECTIVELY WITH THE REQUESTER
  - COMMUNICATE EFFECTIVELY WITH THE OFFICIALS TASKED TO CONDUCT A SEARCH OR REVIEW OF DOCUMENTS
  - MAINTAIN AN ADMINISTRATIVE RECORD THAT DELINEATE ACTIONS TAKEN
  - KNOW YOUR SUBJECT – THAT MEANS YOU NEED TO READ AND STUDY THE SCOPE OF THE EXEMPTIONS, ADMINISTRATIVE PROCESSES, PROCESSING PROCEDURES
  - BUILD A TEAM THAT TRANSCENDS YOUR ORGANIZATION – DON'T BE AFRAID TO ASK FOR HELP
  - RECEIVE ANNUAL TRAINING

BACKGROUND

- WHEN WE THINK FOIA – WE THINK ABOUT “AGENCY RECORDS”
- WHEN WE THINK PA – WE THINK ABOUT RECORDS ABOUT AN INDIVIDUAL
- IF YOU’RE GOING TO WORK IN EITHER ARENA, YOU NEED TO BUILD A TOOL BOX THAT INCLUDES THE FOLLOWING:

TOOL BOX

- DOD 5400.11 and 5400.11-R (PA)
- DOD 5400-7 and 5400.7-R (FOIA)
- Component implementing instructions and websites
- DOJ's Freedom of Information Act Guide and Privacy Act Overview
- Web sites (DOD PA and FOIA, DOJ, and agency component programs)
- FOIA POST (DOJ website)
- Commercial publications: Privacy Times, Access Reports
- DOJ and American Society of Access Professional (ASAP) websites address training opportunities

WHO'S WHO IN FOIA AND PA

- KNOW YOU POINTS OF CONTACT
  - DOD FOIA: Will Kammer, Jim Hogan, Karen Finnegan
  - DOD Privacy: Vahan Moushegian
  - Component POCs and Agency POCs (http://www.usdoj.gov/foia/foiacontacts.htm)
  - Your legal team
  - Your records manager
  - Your IT professionals

UNDERSTANDING THE ACTS

- BOTH ACTS ALLOW INDIVIDUALS TO SEEK ACCESS TO RECORDS
  - FOIA – ADDRESSES ACCESS TO AGENCY RECORDS
  - PA – ADDRESSES ACCESS TO RECORDS THAT ARE RETRIEVED BY AN INDIVIDUAL'S NAME AND/OR PERSONAL IDENTIFIER

FOCUSING ON FOIA

- FOIA ALLOWS INDIVIDUALS TO SEEK ACCESS TO AGENCY RECORDS
  - ENACTED IN 1966 – IMPLEMENTED IN 1967, IT FIRMLY ESTABISHED AN EFFECTIVE STATUTORY RIGHT OF PUBLIC ACCESS TO EXECUTIVE BRANCH INFORMATION IN THE FEDERAL GOVERNMENT
  - LITIGATION AND LEGISLATION HAVE CHANGED ITS IMPLEMENATION
  - GOAL: INFORMED CITIZENRY

FOIA CONTINUES TO CHANGE

- MAJOR AMENDMENTS TO THE FOIA IN 1974, 1976, 1986, 1996, AND IN 2005 WITH THE PRESIDENT'S SIGNING OF EXECUTIVE ORDER 13,392
- ATTORNEY GENERALS HAVE INTERPRETED THE SCOPE OF SOME EXEMPTIONS
- LITIGATION HAS CHANGED HOW WE DO BUSINESS
- RELEVANCY: YOU MUST KEEP ABREAST OF LEGISLATIVE AND LITIGATIVE CHANGES

FOCUSING ON FOIA: WHAT'S A FOIA REQUEST?

A request from any person for access to:

- Agency program files.
- Personal records on another individual.
- Personal records about himself that are **NOT** filed within a Privacy Act system of records.

FOIA RULES

Allows “any person” to request copies of agency records, and they are not required to state why they want the information, unless such information needs to be factored in a decision to reduce/waive processing fees.

Requester has to follow agency rules and agree to pay fees.

We must advise requesters on our decision regarding release within 20 business days.

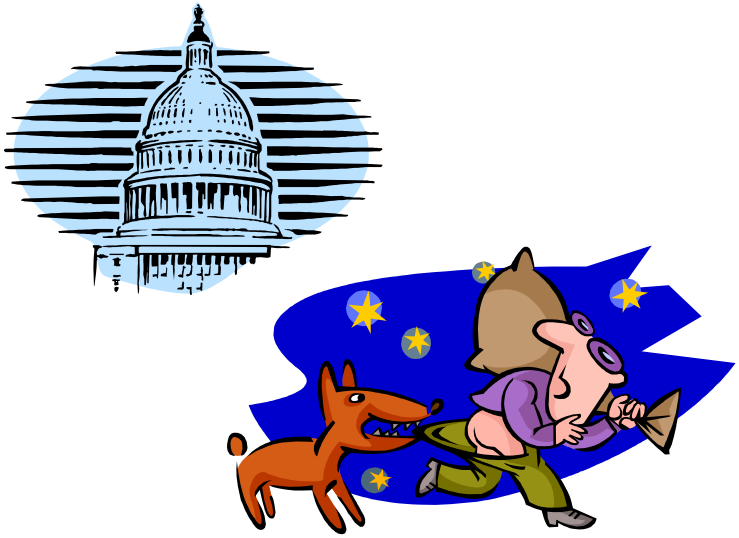
Who May File a FOIA Request?

Any person. Two broad classes are excluded from "any person:"

federal government entities

and

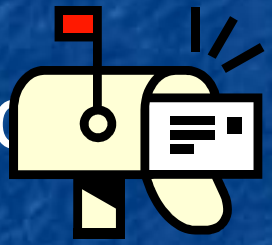
fugitives from justice



How are Requests to be Filed?

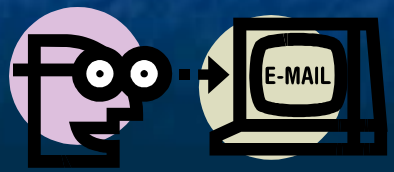
Requests must be in writing.

They may be mailed



faxed,

or dropped into electronic E-FOIA mail boxes.



FOIA Fees

We bill requesters for FOIA services based on who they are. FOIA Managers determine the requester's fee category and what fees to assess.

-- Commercial users pay for all search, review, & copying.

-- News media and educational requesters pay for copying (but the first 100 pages are provided free).

-- "All Others" pay for all search and all copying (but the first 2 hours of search and the first 100 pages are provided free).

If the billable cost to process a request is $15 or less, then we automatically waive the fee.

What Constitutes an *Agency Record* for FOIA Purposes?

"Agency records" are those created or received in the course of conducting agency business, including paper, electronic or other physical forms. They include reports, letters, photograph[illegible]mails, etc.

A record must exist and be in the possession and control of the agency before it is considered for release.

The following are NOT considered agency records

Objects (furniture, wall paintings, etc)

Nontangibles (an individual's memory or oral communications)

Personal records of an individual that are:

- Maintained for the convenience of the employee AND
- Not subject to record retention and disposal rules.

Private material brought into the agency for employee's reference.

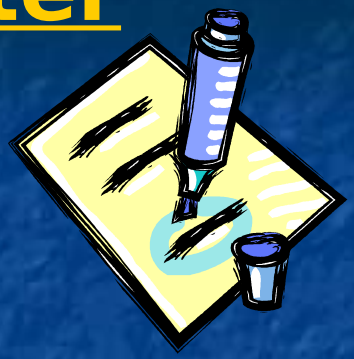
Notes created by supervisors and other employees provided they are:

- Not filed with official records; and
- Not shared with other employees; and
- Not required by law, regulation or custom to be created; and
- Not used in the decisionmaking process.

Possession and Control

A record must be under your possession and control before it may be released. A record is in your "possession" if you have it in official files. A record is under your "control" if you created it, had it created under contract, or if the record is considered to be "owned" by your activity, by law, or regulation.

Do we give a FOIA requester everything he asks for?



Sometimes we have to issue full or partial denials. The FOIA lists nine categories of information that may be withheld from the public. These nine categories are referred to as “exemptions.” Whenever something is redacted (withheld) from a document, we are required to tell the requester why we are withholding the information, which of the exemptions apply, and how to file an appeal.

FOIA EXEMPTIONS

Invoking a FOIA Exemption. The decision to withhold a document from a FOIA requester is not made until after receipt of the request and after the search has been completed. At that point, someone must review the stack of requested documents to determine if any of the 9 FOIA exemptions apply. If so, the exempt material is deleted from the requester's copy. Otherwise, a full release is made.

FOIA EXEMPTIONS

Exemption 1, Classified Material (5 U.S.C. 552(b)(1)): Information that is currently and properly classified under E.O. 12,958.

HARM: Injure the interests of national defense.

Exemption 2, Internal Matters (5 U.S.C. 552(b)(2)).

HARM: Release could allow someone to circumvent, frustrate, or render ineffective laws, statutes, or agency regulations.

Exemption 3, Information prohibited from release by Federal statute (5 U.S.C. 552(b)(3)). HARM: Release would violate Federal law. Some laws set both criminal and civil penalties for wrongfully disclosing information to one not entitled to receive it.

MORE FOIA EXEMPTIONS

Exemption 4, Trade Secret, Commercial, and Financial Data Submitted in Confidence (5 U.S.C. 552(b)(4)). HARM: Release could result in competitive harm to the submitter or impair government's ability to obtain necessary information in the future. The term "submitter" includes a wide range of entities, including businesses, not-for-profit organizations, state, local, and foreign governments, consultants, etc. In most circumstances, we are required to let the submitters know we plan to publicly disclose their information and provide them with an opportunity to comment on or formally bar disclosure through the courts.

MORE FOIA EXEMPTIONS

Exemption 5, Government Privileged Information (5 U.S.C. 552(b)(5)). Information that would not be disclosable in litigation. This exemption covers all documents immune from civil discovery, the formal process by which litigants obtain information from each other for use in litigation. There are multiple discovery privileges; however, the most widely claimed are the deliberative process, attorney-client, attorney work product, and government commercial. HARM: Release could stifle open and honest communication within the agency; interfere with adversarial trial processes; or interfere with the procurement process by prematurely disclosing government costs, estimates, etc.

MORE FOIA EXEMPTIONS

Exemption 6, Personal Privacy (5 U.S.C. 552(b)(6)). HARM: Release could constitute a clearly unwarranted invasion to an individual's privacy.

Exemption 7, Records compiled for law enforcement purposes (5 U.S.C. 552(b)(7)). This exemption has 6 separate prongs, as follows:

5 U.S.C. 552(b)(7)(A) – Interference. HARM: Release could interfere with enforcement proceedings. So long as the investigation or final agency decision on the investigation is pending, this prong protects the entire investigative file. This exemption expires when the investigation is complete and the agency's action has been decided.

MORE FOIA EXEMPTIONS

5 U.S.C. 552(b)(7)(B) – Fair Trial. HARM: Release could create prejudicial pretrial publicity that could deprive a person of a right to a fair trial or impartial adjudication.

5 U.S.C. 552(b)(7)(C) – Personal Privacy. HARM: Release could constitute an unwarranted invasion of personal privacy. This exemption is applied to the names and identifying details of investigators, suspects, witnesses, sources, and persons casually mentioned in law enforcement records. There is a strong interest in protecting individuals from being associated with alleged criminal activity. Despite the similarities in language with FOIA Exemption 6, Exemption (7)(C) is much broader.

5 U.S.C. 552(b)(7)(D) – Confidential Sources. HARM: Release could disclose the identity of a source, including a State, local or foreign agency who furnished information on a confidential basis. Source names are protected to prevent retaliation against sources and to ensure that witnesses continue to be willing to talk to investigators.

MORE FOIA EXEMPTIONS

5 U.S.C. 552(b)(7)(E) – Investigative Techniques and Procedures. HARM: Release would allow people to break the law and go undetected. Examples of data appropriate for withholding would be the location of hidden cameras, methods by which investigators verify statements, procedures for detecting criminals, etc.

5 U.S.C. 552(b)(7)(F) – Physical Safety. HARM: This exemption allows the withholding of information necessary to protect the physical safety of a wide range of individuals and is appropriately applied when a requester has threatened individuals in the past. While this exemption is similar to Exemption (7)(C), it is considerably broader. So long as there is a reasonable likelihood of disclosure risking physical harm to any individual, the person's name and identifying data may be withheld.

MORE FOIA EXEMPTIONS

5 U.S.C. 552(b)(8) – Banking Information

HARM: Release would allow harm the regulation of supervision of financial institutions.

5 U.S.C. 552(b)(9) – Geological/Geophysical Information

HARM: This exemption allows the withholding of information regarding maps, concerning wells. Often referred to as the EXXON exemption.

REASONABLY SEGREGABLE

- FOIA IS NOT AN ALL OR NOTHING STATUTE
- IT REQUIRES AGENCIES TO RELEASE ALL REASONABLY SEGREGABLE INFORMATION

Appeals

Any response deemed “adverse” may be appealed.

Appeals are to be directed to the appellate authority.

Once an appeal is received, the Initial Denial Authority (IDA) will be asked to provide the case file.

A “No Record” Denial

Although the Oglesby decision (Oglesby v. Department of the Army, 920 F. 2d 57 (D.C. Cir 1990)) established the requirement to treat a no record finding as an adverse action, responses do not have to be signed by an IDA, but the requester must be apprised of the right to appeal the adequacy of search.

FOIA FEES AND PERFECTED REQUESTS

- A SEPARATE DOD TRAINING PROGRAM ENTITLED “A DOD “NUTS AND BOLTS SESSION FOR FOIA OFFICERS” WILL FOCUS ON FOIA FEES AND WHAT IS A PROPERLY FILED OR PERFECTED FOIA REQUEST.

Electronic FOIA Websites

Under subsection (a)(2) of the FOIA, agencies must make four distinct categories of records affirmatively available for "public inspection and copying.“ These so-called "reading room" records consist of:

(1) "final opinions [and] . . . orders" rendered in the adjudication of administrative cases;

(2) specific agency policy statements;

(3) certain administrative staff manuals; and,

(4) as of March 31, 1997, records disclosed in response to a FOIA request that "the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records.”

The FOIA now requires that these records made available electronically as well as in paper format. DON accomplishes electronic availability through its FOIA website.

SUMMARY

- ANY PERSON – ANY REASON CAN SEEK ACCESS TO AGENCY RECORDS
- RESPONSE MADE WITHIN 20 WORKING DAYS
- CAN NEGOTIATE INFORMAL EXTENSION OR SEEK FORMAL EXTENSION OF TIME LIMITS
- THERE ARE 9 EXEMPTIONS THAT ALLOW FOR THE PROTECTION OF INFORMATION IN WHOLE OR IN PART
- MUST PROVIDE ALL REASONABLY SEGRGABLE INFORMATION
- MUST IDENTIFY INFORMATION WITHHELD
- DENIALS REQUIRE NOTIFICATION OF APPEAL RIGHTS
- FEES MUST BE RESOLVED BEFORE PROCESSING COMMENCES
- INDIVIDUAL CAN FILE AN APPEAL/LITIGATE

PRIVACY ACT OF 1974

- IT IS A OMNIBUS CODE OF FAIR INFORMATION PRACTICES THAT ATTEMPTS TO REGULATE THE COLLECTION, MAINTENANCE, USE, AND DISSEMINATION OF PERSONAL INFORMATION BY FEDERAL EXECUTIVE BRANCH AGENCIES.

PRIVACY RECORDS

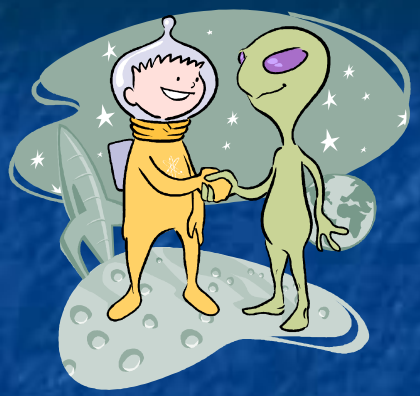
- WE ARE TALKING ABOUT, RECORDS THAT ARE RETRIEVED BY AN INDIVIDUAL'S NAME AND PERSONAL IDENTIFIER THAT ARE CONTAINED IN A PRIVACY ACT SYSTEM OF RECORDS.
- THE SYSTEM OF RECORDS NOTICE IDENTIFIES THE INFORMATION THAT IS BEING MAINTAINED AND IDENTIFIES THE KINDS OF INFORMATION, IF ANY, THAT CAN BE WITHHELD.

Privacy Act Request

A request from a U.S. citizen or lawfully admitted alien (or requester's authorized agent) –

- to gain access to his records in a "System of Records."
- to have information in his/her file corrected
- to gain access to an "Accounting of Disclosures" – a list of all individuals who had access to his file.

Privacy Act



- Allows U. S. Citizens and lawfully-admitted aliens to have access to their own records that are filed within a "system of records."
- A requester may ask to have incorrect factual data amended.
- No charge for the request.
- Agency must respond to access requests within 20 business days and to amendment requests within 30 business days.

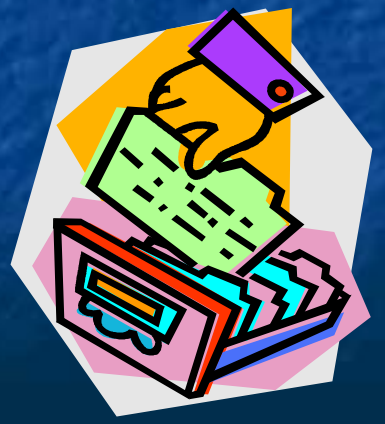
"Privacy Act System of Records" Defined

A group of records under the control of an agency from which personal information

is retrieved by an individual's name or by some identifying number, symbol, or other identifying particular assigned to an individual;

and

contains (along with the unique identifier) another item of personal data.



The following are NOT Privacy Act systems of records – even though they may contain personal information

- Read files: These are retrieved by date, not personal identifier.

- Folders with employees names on the label: only containing non-personal information, such as a copy of the employee's position description. These do not contain the required second element of personal data.

- Folders or databases containing commercial and financial data pertaining to contracts. Contractors have no expectation of privacy regarding their operations. They may, however, expect the data to be handled on a proprietary or confidential basis.

PRIVACY ACT EXEMPTIONS

Invoking a Privacy Act Exemption. The decision to withhold a document from a Privacy Act requester is made long before a request is ever received. It is made at the time the system of records notice and exemption rule are being developed. The "Exemptions Claimed for this System" paragraph of the notice states exactly which Privacy Act exemptions the agency intends to invoke when a request is received. If no exemption are claimed for the system, a full release must generally be made.

Exceptions: If the information is classified. DOD has a blanket (k)(1) exemption for all its systems.

If the information was compiled in anticipation of litigation, under (d)(5) that information can be withheld.

Privacy Act Exemptions

The PA system of records notice identifies whether or not all or part of the records contained in the systems notice qualify for withholding.

The Privacy Act Exemptions that are allowed to be claimed are addressed in the systems notice.

The agency must publish its intentions to invoke an exemption beforehand. This takes the form of an "Exemption Rule" that is published in the Federal Register and codified in the activity's formal Privacy Act rules. It is also published in the Exemption Clause of the governing system notice.

Privacy Act Exemptions

The Privacy Act exemptions are found in 3 sections of 5 U.S.C. 552a:

The General Exemptions in Subsection (j). These exemptions may only be claimed in certain agencies. While DLA never cites these, here they are for information:

(j)(1) records maintained by the Central Intelligence Agency.

(j)(2) records maintain by an agency that performs as its principal function any activity pertaining to the enforcement of criminal laws.

Privacy Act Exemptions (continued)

The Specific Exemptions in Subsection (k):

(k)(1) Classified records.

(k)(2) Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2): Provided, however, That if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identify of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.

Privacy Act Exemptions (continued)

(k)(3) Material involved with protection of the President or other individuals per 18 U.S.C. 3056.

(k)(4) Required by statute to be maintained and used solely as statistical records.

(k)(5) Investigatory material compiled solely for determ suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.

Privacy Act Exemptions (continued)

(k)(6) Testing or examination material used solely to determin individual qualifications for appointment or promotion in the Federal service the disclosure of which would compromise the objectivity of fairness of the testing or examination process.

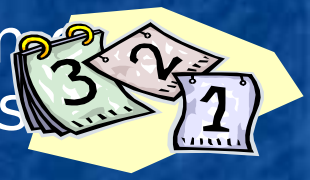
(k)(7) Evaluation material used to determine potential for promotion in the armed services, but only to the extent that the disclosure of the material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.

Subsection (d)(5): This section allows withholding of material compiled in reasonable anticipation of civil action or proceeding.

Privacy Act vs. FOIA

Exemptions: Both statutes have their own unique exemptions that you may be required to apply.

Time Limits: 20 days from date of receipt for FOIA and Privacy Act access requests; 30 days from date of receipt for Privacy Act amendment requests.



Appeal Rights: Both statutes have provisions that allow the requester to appeal any decision you make. Appeals must be filed within 60 calendar days from the date of your denial letter.

Miscellaneous Do's and Don't

- Maintain a file of FOIA policy documents. Destroy only when superseded.
- Do not release or deny a record you did not create. Instead, refer it to the creating agency.
- Records placed in a Federal Records Center for storage are subject to FOIA. Recall as necessary.
- Before issuing a "no record" denial claiming the records have been destroyed, check the Records Disposition Guide.
- If you receive requests for your FOIA log, delete the names of Privacy Act requesters. Cite (b)(6).

Miscellaneous Do's and Don't

- Destroy FOIA records on time
  - Denials – Retain for 6 years.
  - All other cases – Retain for 2 years.
  - Logs – Retain for 6 years after last entry.
  - Feeder Reports – Retain for 2 years.
  - Policies – Destroy when superseded.

- Don't deny a record under the Privacy Act unless a FOIA exemption also applies. Cite both FOIA and Privacy exemptions.

- Bill where fees are involved. Do not waive fees unless justified or they fall within the automatic waiver threshold.

- Include appeal rights on all adverse determinations, including fee denials, category refusals, etc.

FINAL THOUGHT

- ENJOY YOUR JOB BY:
  - PUTTING THE FUN IN FOIA!
  - DEVELOPING A PASSION FOR PRIVACY!
  - NETWORKING WITH YOUR COLLEAGUES

TRAINING INFO

- Presented by: Doris Lama
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  These slides are downloadable from www.foia.navy.mil (Resource Materials – training materials)